

Explaining Judicial Behavior on the Federal Sentencing Guidelines

A Senior Honors Thesis

Presented in Partial Fulfillment of the Requirements for graduation
with research distinction in Political Science in the undergraduate colleges
of The Ohio State University

by

Rajiv Mohan

The Ohio State University
May 2009

Project Advisor: Professor Lawrence Baum, Department of Political Science

Introduction

In the 2005 case *United States v. Booker*, the Supreme Court transformed the nature of federal sentencing by declaring the application of the Federal Sentencing Guidelines unconstitutional and as a remedy, making the once mandatory guidelines merely advisory. Prior to *Booker*, sentencing judges were bound to sentence within a given range based on a calculation involving the offense and the defendant's criminal history. Departures were rare and required additional factfinding by judges. These circumstances generally referred to if the defendant had "special offender characteristics" such as age, physical condition, or mental condition. Though somewhat broad, these characteristics were generally only considered in unusual cases.¹ *Booker* was based on the principle that any fact necessary to impose a sentence must be found by a jury, not a judge. Under mandatory guidelines, imposing an above guideline sentence required judicial factfinding, which would violate the Sixth Amendment right to a trial by jury.

Five justices subscribed to this view, holding judicial factfinding under mandatory Guidelines to violate the Sixth Amendment. But the Court was still left with various remedial options to make the Guidelines compliant with the Sixth Amendment. They could, for example, retain mandatory guidelines but require jury determination of facts necessary to impose an above guideline sentence. A distinct set of five justices², however, took a different route: making the Guidelines advisory instead of mandatory and maintaining judicial factfinding. By making the Guidelines advisory, the Court created a system where judicial factfinding was not necessary to impose an above guideline

¹ United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing*, 108th Cong., 2nd sess., (Washington DC, 2004).

² Justice Stevens wrote the opinion of the court on the Sixth Amendment issue. He was joined by Justices Scalia, Souter, Thomas, and Ginsburg. Justice Breyer wrote the opinion of the court on the remedial issue. He was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg.

sentence and therefore consistent with the Sixth Amendment. The Court noted the Guidelines, though not legally binding, were still important. To ensure that sentences were not handed out arbitrarily, the Court mandated appellate review of sentences for reasonableness. The court did not explicate much regarding what would make a sentence reasonable. How appellate courts conducted reasonableness review would have a significant impact on the weight advisory guidelines would carry.³

Booker had significant implications for criminal defendants. Judges once bound by the structured Guidelines were now free, formally at least, to sentence at their own discretion. They were subject only to appellate review for reasonableness, which was a fairly vague standard. The Court did stress that the Guidelines still carried weight. But just how much and the particularities of reasonableness review were left largely to the lower courts to sort out.

The behavior of these lower court judges is then of significance. The Supreme Court interestingly defied the prevailing ideological explanation of judicial behavior in *Booker*. The more conservative Justice Scalia stood united with the more liberal Justice Stevens in forcefully advocating the unconstitutionality of mandatory guidelines and opposing the remedy of advisory guidelines. On the other side, ideological opposites Chief Justice Rehnquist and Justice Breyer joined to defend the constitutionality of the Guidelines and to push for advisory guidelines as a remedy. The behavior of the Court was inconsistent with the dominant attitudinal model of judicial behavior, which holds ideology to be the driving factor in Supreme Court decision making.⁴

³ *United States v. Booker*, 543 U.S. 220 (2005).

⁴ Jeffrey A. Segal et al., "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited," *The Journal of Politics* 57, no. 3 (August 1995): 812-823.

But while the breakdown of ideology was starkly apparent in the Supreme Court, the question remained as to whether this was also the case in the lower courts. Indeed, while much attention has been placed on Supreme Court justices, the behavior of lower court judges is perhaps the more crucial issue, especially for criminal defendants. After all, the circuit level is as high as the vast majority of cases ever reach. This thesis strives to provide insight into the behavior of these judges by looking at their behavior on issues relating to *Booker* and the Federal Sentencing Guidelines. It looks not only at ideology, but also other potential explanations such as legalist and pragmatist principles, judicial workload, and district court experience.

This thesis fits into the larger framework of explaining judicial behavior and more specifically, the behavior of appellate court judges. Research in this area has taken many tracks, the most dominant of which is the attitudinal model. The attitudinal model suggests that ideology, whether a judge is liberal or conservative, is the driving factor in judicial decision making. Indeed, there is a good bit of literature that supports this notion.⁵ Despite the strength of ideology in explaining judicial behavior, there has also been much work on what role the law plays in decision making. For the lower courts this has largely focused on the effects of precedent.⁶ More comprehensive legal theories such as originalism have also been looked at.⁷ Scholars have also used economic theory to

⁵ See Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals Revisited," *The American Political Science Review* 69, no. 2 (June 1975): 491-506; Cass R. Sunstein et al., *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Brookings Institution Press, 2006).

⁶ See Frank Cross, "Appellate Court Adherence to Precedent," 2 *Journal of Empirical Legal Studies* 369 (2005); David E. Klein and Robert J. Hume, "Fear of Reversal as an Explanation of Lower Court Compliance," *Law & Society Review* 37, no. 3 (September 2003): 579-606.

⁷ Robert M. Howard and Jeffrey A. Segal, "An Original Look at Originalism," *Law & Society Review* 36, no. 1 (2002): 113-138.

explain judicial behavior.⁸ In this framework, the judge is treated as a “rational, self-interested utility maximizer,” where utility is comprised of factors such as income, leisure, power, prestige, reputation, and intrinsic pleasure.⁹

This thesis looks at appellate court decision making in relation to the Federal Sentencing Guidelines from all these perspectives. It tests the explanatory power of ideology on judicial decision making. It also looks at legal factors. Given the transformative effect of *Booker* and the broad discretion the Supreme Court afforded to appellate judges, precedent would likely not be much of a constraint. Instead, this thesis looks at the difference between legalists or formalists, who focus more on the law, and pragmatists, who focus more on consequences.¹⁰ It does this by looking at ideological extremism. Granted, ideological extremism is not a perfect proxy; however, it still provides some tangible means of quantitatively examining the issue. Economically, this thesis focuses on the leisure aspect of judicial utility through the examination of the relationship between judicial workload and behavior. It may be the case that judges choose certain doctrines based on their tendency to reduce future workload. In addition to these angles, this thesis looks at whether having district court experience has any effect on decision making in this area. District court judges are responsible for actually sentencing defendants, so it may be that having this experience may drive judges to act in a certain way. The Guidelines are a particularly interesting area to examine judicial behavior. They raise fundamental legal questions, demanding policy judgments, and real concerns over the efficiency of the courts.

⁸ Richard A. Posner, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does),” *Supreme Court Economic Review* 3 (1993): 1-41.

⁹ Richard A. Posner, *How Judges Think* (Harvard University Press, 2008), 35-36.

¹⁰ Posner, *How Judges Think*, 40-41.

Issues

The lack of direct guidance to lower courts in *Booker* created a multitude of issues for the appellate courts to sort out. Though many of these issues were precise and technical, larger issues emerged across the circuits that were viable for meaningful analysis. This thesis looks at the following issues: the constitutionality of the Guidelines, what to do about appeals that were still pending when *Booker* was decided, whether judges could adopt a presumption of reasonableness for within guideline sentences, and whether judges could deviate from the set crack-cocaine ratio set by the Guidelines. All of these issues were addressed broadly by many circuits and resulted in significant circuit splits. In addition to the constitutionality of the Guidelines, the presumption of reasonableness issue and the crack-cocaine issue created enough conflict to ultimately warrant Supreme Court review.¹¹ The issue of how to deal with pending appeals also resulted in a deep circuit split, but the Supreme Court denied certiorari. Sentencing expert Douglas Berman suggested the issue was worthy of Supreme Court review but that by the time the Court ruled, the number of applicable cases would be so small as to make a decision ineffectual.¹² Nevertheless, these issues were all central as to how a post-*Booker* sentencing world would operate and created significant conflict between the circuits.

Constitutionality of the Guidelines

Booker was preceded by a line of cases that made its outcome not wholly unexpected. The Supreme Court first transformed the sentencing landscape in the 2000 case *Apprendi v. New Jersey* by establishing the principle that any fact that increases a

¹¹ *Rita v. United States*, 551 U.S. 338 (2007); *Kimbrough v. United States*, 552 U.S. ____ (2007).

¹² Douglas A. Berman, "Pondering the SCOTUS plain error dodge," *Sentencing Law and Policy*, June 20, 2005, http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/pondering_the_s.html.

sentence beyond the statutory maximum must be found by a jury, beyond a reasonable doubt.¹³ In the 2004 case *Blakely v. Washington*, the Supreme Court applied this reasoning to the state of Washington’s sentencing guidelines. The relevant statutory maximum was the top of the guideline range. Thus, any fact necessary to impose an above guideline sentence had to be found by a jury, not a judge.¹⁴

The structure of the Washington scheme was very similar to the federal scheme leading to the expectation that the Court would extend *Blakely* to the Federal Sentencing Guidelines. Indeed, in dissent, Justice Breyer hinted at the fate of the Guidelines in saying, “Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.”¹⁵ Thus, following *Blakely*, the lower courts had the opportunity to address whether the Federal Sentencing Guidelines were constitutional. Although there seemed to be a good deal of expectation that the Guidelines were unconstitutional, the majority of circuits that addressed the issue found them constitutional.

Table 1. Positions on the Constitutionality of the Guidelines

Circuit	Case	Outcome
2 nd	<i>United States v. Mincey</i>	Constitutional
4 th	<i>United States v. Hammoud</i>	Constitutional
5 th	<i>United States v. Pineiro</i>	Constitutional
6 th	<i>United States v. Koch</i>	Constitutional
7 th	<i>United States v. Booker</i>	Unconstitutional
8 th	<i>United States v. Mooney</i>	Unconstitutional
9 th	<i>United States v. Ameline</i>	Unconstitutional
11 th	<i>United States v. Reese</i>	Constitutional

For the courts that struck down the Guidelines, these cases presented a straightforward application of *Blakely*. In the 7th Circuit *Booker* case that eventually reached the Supreme Court, Judge Richard Posner wrote, “*Blakely* dooms the guidelines

¹³ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¹⁴ *Blakely v. Washington*, 542 U.S. 296 (2004).

¹⁵ *Blakely v. Washington*, 542 U.S. 296, 346 (2004) (Breyer, J. dissenting).

insofar as they require that sentences be based on facts found by a judge.”¹⁶ Imposing an above guideline sentence required additional facts, which if found by a judge, violated the Sixth Amendment. The 7th Circuit left sentencing judges with the option of imposing a within guideline sentence or submitting the facts necessary for an above guideline sentence to a sentencing jury. The court declined to rule on the severability of the guidelines. If the requirement that judges find sentencing facts was not severable from the rest of the substantive portions of the Guidelines, the Guidelines as a whole would fall.¹⁷ The other circuits that held this view ruled in a similar manner. The 9th Circuit in *Ameline* for example, held the top of the guideline range to be the relevant statutory maximum, but declined to rule the Guidelines as a whole facially invalid.¹⁸

The courts upholding the Guidelines rested their cases on grounds both procedural and substantive. Judge Frank Easterbrook expressed the procedural objections to ruling the Guidelines unconstitutional in his dissent in *Booker*. He noted that existing case law allowed judicial factfinding in relation to the Federal Sentencing Guidelines so long as the sentence was within the overall statutory maximum, not the narrower *Blakely* view.¹⁹ Even if *Blakely* completely undermined this decision, it did not mean a lower court was “entitled to put it in a coffin while it is still breathing.”²⁰ Only the Supreme Court could overrule one of its own decisions.

The substantive reasons for upholding the Federal Sentencing Guidelines were based primarily on distinguishing them structurally from those at issue in *Blakely*.

Writing for the 6th Circuit in *United States v. Koch*, Judge Jeffrey Sutton argued that

¹⁶ *United States v. Booker*, 375 F. 3d 508, 511 (7th Cir. 2004).

¹⁷ *Booker* 375 F. 3d at 515.

¹⁸ *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

¹⁹ *Edwards v. United States*, 523 U.S. 511 (1998).

²⁰ *Booker*, 375 F. 3d at 516.

unlike *Blakely*, these guidelines were not statutes. Instead, they were “agency-promulgated rules enacted by the Sentencing Commission—a non-elected body that finds its home within the Judicial Branch, the very branch of government in which sentencing discretion has traditionally been vested.”²¹ This distinction was at least enough not to require applying *Blakely* to the Federal Sentencing Guidelines. Given the drastic effects of striking down the Guidelines, it was better to err on the side of the caution. Legal arguments aside, this fear of dramatically altering the sentencing landscape was a central concern of judges. Easterbrook warned, “Today’s decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this soon.”²²

Plain Error

Of course, Judge Easterbrook’s superiors did have something to say. A pressing concern once *Booker* was decided was how to deal cases that were still pending. *Booker* would apply to these cases, but as Justice Breyer suggested in his remedial opinion, “That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing... we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the ‘plain-error’ test.”²³ If the issue was not raised in the lower courts, appellate courts had only the discretion to correct plain errors.

²¹ *United States v. Koch*, 383 F.3d 436, 441 (6th Cir. 2004).

²² *Booker*, 375 F. 3d at 521.

²³ *Booker*, 543 U.S. at 268.

To make this determination, the Court set out a four pronged test in *United States v. Olano*: there had to be an error, the error had to be plain or clear, it had to affect substantial rights, and the error had to affect the fairness, integrity or public reputation of judicial proceedings. To affect substantial rights, the error had to be prejudicial, meaning the defendant had to show his sentence would have been different if not for the error. The Supreme Court also left open the possibility that courts of appeals could deem some errors presumptively prejudiced.²⁴ It is important to note that there were two possible errors. The first was constitutional error, which occurred if a defendant's sentence was increased above the relevant guideline based on facts not found by a jury. The second was statutory error, which was that a sentence was imposed under mandatory, instead of advisory guidelines. Statutory error was present in every case, whereas constitutional error was only present in a small number of cases. Most courts did not distinguish between the two for the purposes of plain error analysis except for the courts that adopted a presumption of prejudice. All courts agreed that there was an error and that it was clear. They diverged, however, primarily on the whether the error affected substantial rights.

The simplest application of *Olano* was to require a defendant to show a reasonable probability that his sentence would have been different if not for the error. This approach was adopted by the 1st, 5th, 8th, 10th, and 11th circuits. The 11th Circuit in *United States v. Rodriguez* noted that fulfilling the third prong was meant to be tough so as to “encourage timely objections and reduce wasteful reversals.”²⁵ Accordingly, the burden was squarely on the defendant to show he would have received a different sentence under advisory guidelines. Admittedly, this would be very difficult to show and

²⁴ *United States v. Olano*, 507 U.S. 725 (1993).

²⁵ *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005).

in most cases the court simply could not know if the sentence would have been different. But given the toughness of plain error review, “If the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses.”²⁶ Other circuits criticized the harshness of this approach. Writing for the 7th Circuit, Judge Posner wondered, “Why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence.”²⁷

Table 2. Positions on Plain Error

Circuit	Case	Outcome
1 st	<i>United States v. Antonakopoulos</i>	Reasonable Probability
1 st	<i>United States v. Serrano-Beauvaix</i>	Reasonable Probability
2 nd	<i>United States v. Crosby</i>	Limited Remand
3 rd	<i>United States v. Davis</i>	Presumption of Prejudice
4 th	<i>United States v. Hughes</i>	Presumption of Prejudice
5 th	<i>United States v. Mares</i>	Reasonable Probability
6 th	<i>United States v. Barnett</i>	Presumption of Prejudice
6 th	<i>United States v. Oliver</i>	Presumption of Prejudice
7 th	<i>United States v. Paladino</i>	Limited Remand
8 th	<i>United States v. Pirani</i>	Reasonable Probability
9 th	<i>United States v. Ameline</i>	Limited Remand
10 th	<i>United States v. Gonzalez-Huerta</i>	Reasonable Probability
11 th	<i>United States v. Rodriguez</i>	Reasonable Probability
11 th	<i>United States v. Thompson</i>	Reasonable Probability
D.C.	<i>United States v. Coles</i>	Limited Remand

The 3rd, 4th, and 6th circuits adopted an approach more lenient to defendants by utilizing the Supreme Court’s suggestion in *Olano* that presuming prejudice was appropriate in certain instances. These courts also distinguished between constitutional and statutory error. If there was a constitutional error, the third prong was always met.²⁸ If there was only statutory error, the courts adopted a rebuttable presumption of prejudice. In *United States v. Barnett*, the 6th Circuit noted courts have used this approach

²⁶ *Rodriguez*, 398 F.3d at 1299.

²⁷ *United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005).

²⁸ *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005).

when “the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court would have been different had the error not occurred.”²⁹ According to these circuits, the *Booker* remedy fundamentally transformed the structure of federal sentencing in a way that made it extraordinarily difficult for defendants to show their sentence would have been different. To show this a defendant “would presumably have to demonstrate that the district court somehow intimated that it felt constrained by the Guidelines or that it would have preferred to sentence the defendant to a lower sentence.”³⁰ Given the long-standing and mandatory nature of the Guidelines and the mechanisms of appellate review that sought to ensure within guideline sentences, it was unrealistic for district courts to do this and presuming prejudice was appropriate. It is important to note that this presumption was rebuttable, but the burden was on the government, a fundamental shift from the other circuits that placed it on the defendant.

Other circuits criticized this approach for remanding every case with a constitutional error and just about every case with a statutory error. The presumption approach “overlooked... if the judge would have imposed the same sentence even if he thought the guidelines merely advisory...”³¹ Clearly, there was no prejudice in this potentially real hypothetical, yet the sentence would be remanded anyway.

There was clearly uncertainty over whether sentencing would have been different under advisory guidelines. The circuits that adopted the reasonable probability approach inherently favored the government, while those that presumed prejudice inherently favored defendants. Other circuits, however, took a more novel approach: to get rid of the

²⁹ *United States v. Barnett*, 398 F.3d 516, 526 (6th Cir. 2005).

³⁰ *Barnett*, 398 F.3d at 528.

³¹ *Paladino*, 401 F.3d at 483.

uncertainty once and for all. This was the approach of the 2nd, 7th, 9th, and D.C. circuits and relied on issuing a limited remand to the district court. The appellate court would retain jurisdiction of the appeal, but issue a remand only for the purpose of allowing the district judge to say whether or not he would issue the same sentence under advisory guidelines. If he would, the circuit court would affirm the sentence so long as it was reasonable. If he would not, the circuit court would vacate the sentence and remand for resentencing.³² This was the most nonstandard approach and courts justified it on both practical and legal terms. The 7th Circuit claimed this was “the only practical way (and as it happens also to be the shortest, the easiest, the quickest, and the surest way),” to determine whether a sentence would be different if not for the error.³³ Legally, the 2nd Circuit argued that appellate courts had the statutory power to “remand... for further sentencing proceedings...” sentences imposed in violation of the law.³⁴ It concluded that the limited remand fell into “further sentencing proceedings.” If an appellate court has the power to remand a case fulfilling plain error analysis, it “necessarily has the lesser power to remand for a determination of whether to resentence...”³⁵

Other circuits did not find this justification persuasive. The 11th Circuit argued that plain error review was only to be based on the record before appellate courts. Furthermore, the limited remand practically amounted to requiring resentencing for all cases, as on the limited remand, lawyers were allowed to reargue the sentence. Essentially this was “a mock-resentencing” that also added “the real possibility of another

³² *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005).

³³ *Paladino*, 401 F.3d at 483.

³⁴ 18 U.S.C. § 3742(f) (2007).

³⁵ *Crosby*, 397 F.3d at 117.

appeal and another remand on top of that.”³⁶ According to the 11th Circuit, this was not consistent with the purpose of plain error analysis, which was to dissuade unnecessary reversals.

This resulted in a deep, three-way split among the circuits. The division was not resolved by the Supreme Court despite the Solicitor General seeking writs of certiorari in both *Barnett* and *Rodriguez*. The division had a legitimate impact on defendants. Those that faced a reasonable probability standard had a very small chance of resentencing, while those that faced a presumption of prejudice could almost be certain of it. Nevertheless, since the number of cases implicating this issue was fixed, as time went by the issue waned.

Presumption of Reasonableness

The courts then started to deal with the particularities of reasonableness review. Courts were to review sentences for reasonableness based on several statutory factors. Among many others, these included the nature of the offense, criminal history, the need for the sentence to provide deterrence, and the need for the sentence to promote respect for the law.³⁷ Underlying the issues of reasonableness review was the fundamental question of how much influence advisory guidelines were to have.

A key manifestation of this question was the issue of whether appellate courts could adopt a rebuttable presumption of reasonableness for within guideline sentences. On the one hand, the Guidelines represented years of research and fine-tuning by the United States Sentencing Commission (USSC) and accordingly could be expected to be

³⁶ *Rodriguez*, 398 F.3d at 1305.

³⁷ 18 U.S.C.A. § 3553(a) (2007).

reasonable in many normal cases. But a presumption of reasonableness could provide an incentive for judges to overwhelmingly hand out within guideline sentences as they would very likely be affirmed. Advisory guidelines might be advisory in name only, and would essentially function as mandatory guidelines, seemingly reintroducing the Sixth Amendment problem.

The vast majority of circuits found there to be a rebuttable presumption of reasonableness for within guideline sentences. As the 7th Circuit noted, the Guidelines still were a key component in sentencing, and adopting a presumption of reasonableness was “the best way to express the new balance...”³⁸ An important reason for the presumption, as the 4th Circuit argued, was the “legislative and administrative process by which they were created.”³⁹ Congress gave the task of formulating sentencing guidelines to the USSC, who put an immense amount of research and analysis into developing them. More importantly, that research and analysis is ongoing and the Guidelines are subject to review and revision, allowing them to adapt to changes in the sentencing landscape. There was then good reason to believe that they are generally representative of what a reasonable sentence ought to be.

Additionally, many of the statutory factors the courts were to consider were built into the Guidelines. The nature of the offense and criminal history were integral parts of the Guidelines and Congress charged the USSC to take into account all of the statutory factors when drafting the Guidelines. There was then good reason to expect a within guideline sentence to be consistent with the statutory factors courts were to focus on in reasonableness review.

³⁸ *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

³⁹ *United States v. Johnson*, 445 F.3d 339, 341 (4th Cir. 2006).

Finally, even though the Guidelines were somewhat mechanical, they still relied on extensive, individualized determination of facts and sentences that allowed for some flexibility. This would decrease the likelihood that unusual cases that warranted variance would be unfairly subject to the Guidelines anyway.⁴⁰ It was necessary for this presumption to be rebuttable. To hold within guideline sentences as inherently reasonable, as the government originally argued, would “undo the Supreme Court’s merits analysis in *Booker*.”⁴¹ Still, the 7th Circuit speculated that it would be very “rare” for a within guideline sentence to be unreasonable, suggesting very few defendants would actually be able to rebut the presumption.⁴²

Table 3. Positions on Presumption of Reasonableness

Circuit	Case	Outcome
1 st	<i>United States v. Jimenez-Beltre</i>	No Presumption
2 nd	<i>United States v. Fernandez</i>	No Presumption
3 rd	<i>United States v. Cooper</i>	No Presumption
4 th	<i>United States v. Green</i>	Presumption
4 th	<i>United States v. Johnson</i>	Presumption
5 th	<i>United States v. Alonzo</i>	Presumption
5 th	<i>United States v. Smith</i>	Presumption
6 th	<i>United States v. Foreman</i>	Presumption
6 th	<i>United States v. Williams</i>	Presumption
7 th	<i>United States v. Mykytiuk</i>	Presumption
8 th	<i>United States v. Lincoln</i>	Presumption
10 th	<i>United States v. Kristl</i>	Presumption
11 th	<i>United States v. Talley</i>	No Presumption
D.C.	<i>United States v. Dorcely</i>	Presumption

The courts that did not adopt a presumption of reasonableness based their decisions on the premise that being within the guidelines was not necessarily sufficient to satisfy reasonableness review. As the 3rd Circuit argued, “Although a within-guidelines sentence demonstrates the court considered one of the § 3553(a) factors – namely, the

⁴⁰ *Johnson*, 445 F.3d 339.

⁴¹ *Mykytiuk*, 415 F.3d at 607.

⁴² *Mykytiuk*, 415 F.3d at 608.

guidelines range itself... it does not show the court considered the other standards reflected in that section...⁴³ These courts advocated a more robust interpretation of reasonableness review. As the 2nd Circuit noted, “We examine the record as a whole to determine whether a sentence is reasonable in a specific case.”⁴⁴ These courts ruled that the Guidelines alone did not encompass enough of the relevant statutory factors. Accordingly, it was inappropriate to adopt such a presumption. Still, these circuits admitted “a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range,” and that the burden was still on the defendant to show his sentence to be unreasonable.⁴⁵ Nevertheless, the implications of a presumption were troubling. As the 1st Circuit pointed out, “Although making the guidelines ‘presumptive’ ... does not make them mandatory, it tends in that direction...”⁴⁶

Ultimately, the Supreme Court took up the issue in *Rita v. United States*. Using similar reasoning as the circuit courts that adopted a presumption of reasonableness, the Court held that appellate courts were allowed to do this. It did not, however, mandate such a presumption, meaning the circuit split would continue.⁴⁷

Crack-Cocaine

The Supreme Court resolved the presumption of reasonableness issue, but lower courts still had contentious issues in which to work out the role of the guidelines in a post-*Booker* world. One of these issues focused on one of the more controversial specific guidelines, the one that required 100 times more powder-cocaine than crack-cocaine to

⁴³ *United States v. Cooper*, 437 F.3d 324, 330 (3rd Cir. 2006).

⁴⁴ *United States v. Fernandez*, 443 F.3d 19, 28 (2nd Cir. 2006).

⁴⁵ *Cooper*, 437 F.3d at 331.

⁴⁶ *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006).

⁴⁷ *Rita*, 551 U.S. 338.

give a drug trafficker the same sentence. This particular guideline had come under persistent criticism from the USSC itself since 1995 for creating unwarranted distortions and disparities.⁴⁸ Despite this criticism, Congress rejected several proposed changes to the guideline. Under mandatory guidelines, judges were undoubtedly bound to the 100-to-1 ratio. But the advent of advisory guidelines gave judges a potential opening to depart from the soundly criticized guideline. Some judges simply disregarded the guideline, while others substituted their own alternative ratios. Clearly the Guidelines were advisory after *Booker*, but the Supreme Court also required judges to consider them. The courts had to address the issue of whether judges could legally disregard a particular guideline based on a policy disagreement with it. The question in these cases was whether it was a legal error to disregard the guideline, or a legal error to consider the guideline as binding. A legal error would necessarily make a sentence unreasonable.

Table 4. Positions on Crack-Cocaine Guideline

Circuit	Case	Outcome
1 st	<i>United States v. Pho</i>	Must Follow Ratio
2 nd	<i>United States v. Castillo</i>	Must Follow Ratio
3 rd	<i>United States v. Gunter</i>	Do Not Have to Follow
4 th	<i>United States v. Eura</i>	Must Follow Ratio
5 th	<i>United States v. Leatch</i>	Must Follow Ratio
7 th	<i>United States v. Miller</i>	Must Follow Ratio
8 th	<i>United States v. Johnson</i>	Must Follow Ratio
11 th	<i>United States v. Williams</i>	Must Follow Ratio
D.C.	<i>United States v. Pickett</i>	Do Not Have to Follow

Most of the courts that addressed this issue held that district judges were bound to follow the ratio. In *United States v. Pho*, the 1st Circuit dealt with a district judge who substituted a 20-to-1 ratio for the 100-to-1 ratio. The court held that this amounted to a

⁴⁸ See United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, 104th Cong., 1st sess., (Washington, DC, 1995); United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, 105th Cong., 1st sess., (Washington, DC, 1997); United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, 107th Cong., 2nd sess., (Washington, DC, 2002).

legal error, which would therefore make the sentence unreasonable. It characterized the ratio as “a policy judgment, pure and simple.”⁴⁹ The court argued that policy judgments were in Congress’ province, not the judiciary’s. Accordingly, “Categorical rejection of the 100:1 ratio impermissibly usurps Congress’s judgment about the proper sentencing policy for cocaine offenses.”⁵⁰ The court also seemed concerned with the potential sentencing disparities that could occur if a judge was free to disregard the guideline. The sentences for similarly situated defendants would “depend largely on what judge happens to draw a particular case.”⁵¹ This would run against the initial thrust of the Guidelines and Congress’ goal to create greater uniformity in sentencing. Since the Guidelines were no longer binding, reasonableness review was a key mechanism to ensure uniform sentences. Therefore, allowing judges to deviate from the guideline would undermine this purpose of reasonableness review.

The courts that rejected this reasoning stressed that following *Booker*, all of the Guidelines were advisory. In *United States v. Pickett*, the D.C. Circuit noted the role of appellate courts in reasonableness review was to determine how well a sentence fulfils the relevant statutory factors set out in § 3553(a). The Guidelines were one of these factors, but only one. The relevant inquiry then was “how well the applicable Guideline effectuates the purposes of sentencing enumerated in § 3553(a).”⁵²

The D.C. Circuit had an abundance of evidence from the USSC itself that served as a scathing indictment of the 100-to-1 ratio’s failure to meet these purposes. The court noted the glaring disparities brought about by the ratio. Retail crack dealers got longer

⁴⁹ *United States v. Pho*, 433 F.3d 53, 62 (1st Cir. 2006).

⁵⁰ *Pho*, 433 F.3d at 63.

⁵¹ *Pho*, 433 F.3d at 63.

⁵² *United States v. Pickett*, 475 F. 3d 1347, 1353 (D.C. Cir 2007).

sentences than their distributors, who supplied the powder cocaine from which the crack was made. Similarly situated offenders whose only difference was using crack-cocaine instead of powder-cocaine received significantly different sentences. Additionally, the guideline had “a disproportionate impact on African-American offenders.”⁵³ The court noted, “The Commission thus believes that its Guideline for crack distributors generates sentences that are ‘greater than necessary,’ exaggerates ‘the seriousness of the offense’ of crack trafficking, does not ‘promote respect for the law,’ and does not ‘provide just punishment of the offense.’”⁵⁴ These were all sentencing goals spelled out in § 3553(a) that the crack-cocaine guideline did not meet.

The crack-cocaine guideline’s inherent failure to meet the statutory purposes meant judges could not be bound to follow it. As the 3rd Circuit pointed out in *United States v. Gunter*, this did not authorize district courts to categorically reject the ratio or substitute their own ratio as was the case in *Pho*. But the crack-cocaine guideline was just as advisory as every other guideline and it would be an error for district courts to consider themselves bound by it.⁵⁵ The Supreme Court ultimately took up the issue in *Kimbrough v. United States* and agreed with these courts. Interestingly, the Court very recently issued a short per curiam opinion holding “district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.”⁵⁶

⁵³ *Pickett*, 475 F. 3d at 1354.

⁵⁴ *Pickett*, 475 F. 3d at 1354.

⁵⁵ *United States v. Gunter*, 462 F.3d 237, 249 (3rd Cir. 2006).

⁵⁶ *United States v. Spears*, 555 U.S. ___, slip op. at 5 (2009).

Theory

The potential explanations for judicial behavior on these issues are ideology, legal theories of pragmatism and legalism, judicial workload, and district court experience. There are theoretical reasons to expect all of these factors to have some effect on decision making in the context of the Federal Sentencing Guidelines.

Ideology

Ideology is perhaps the most dominant explanation of judicial behavior and accordingly, it makes sense to analyze it with respect to the Guidelines. Ideology is typically defined by whether a judge is conservative or liberal in terms of policy preferences. It is important to examine just how ideology might be expected to operate in the specific realm of the Federal Sentencing Guidelines. In the general context of criminal law, conservative judges have typically been characterized as anti-defendant, while liberal judges have been characterized as pro-defendant.⁵⁷

There also exist strategic theories of judicial decision making, which are similar to ideological explanations. The key difference is that under strategic theories, judges worry about their relationships with other judges, higher courts and other branches of government. Therefore in intermediate steps, judges may not always act according to their policy preferences if doing so elicits a response from some other actor that is detrimental to the judge's ultimate policy goal.⁵⁸

⁵⁷ Frank Cross, *Decision Making in the U.S. Courts of Appeals*, 1st ed. (Stanford University Press, 2007), 20.

⁵⁸ Lee Epstein and Jack Knight, "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead," *Political Research Quarterly* 53, no. 3 (September 2000): 625-661.

Since both theories deal with the final goals of judges, we would expect them to yield the same results on these issues. Judges were afforded significant discretion and they would likely not have to act differently in response to other forces to achieve these ultimate goals. The application of this view of decision making to sentencing issues is clearer on some issues than others.

Ideological expectations are particularly unclear on the constitutionality of the Guidelines. Striking down the Guidelines based on the Sixth Amendment necessarily puts it in the context of protecting the rights of criminal defendants. Giving defendants the right to have facts necessary for their sentence determined by a jury would be seen as pro-defendant if framed this way. Additionally, if the entire framework fell, increased judicial discretion could result in lower sentences for defendants. This reasoning suggests striking down the Guidelines would benefit defendants, while upholding the Guidelines would work against them.

However, the implications of striking down the Guidelines could have negative effects on criminal defendants. Although no appellate court actually struck down the Guidelines entirely, they did acknowledge the very real possibility that if the Guidelines were severable, the entire framework might fall leaving a judge free to choose any sentence within the overall statutory maximum and minimum.⁵⁹ This would undo the structure that sought to ensure greater uniformity in sentencing. In this sense, striking down the Guidelines could be seen as working against criminal defendants, who would potentially be subject to more arbitrary sentences. Upholding the Guidelines could be seen as pro-defendant by ensuring greater uniformity in sentencing.

⁵⁹ *Booker* 375 F. 3d at 515.

The impact on defendants is clearer on the plain error issue. At the one end, the courts that adopted a presumption of prejudice made it incredibly easy for defendants to be resentenced. After all, the burden was on the government to rebut the presumption, which was not easy by any stretch. For example, the government would have to show that the district court completely foreclosed the possibility of a lower sentence under advisory guidelines, which would be a fairly odd thing to do under a mandatory framework.⁶⁰ At the other end, the courts that followed the reasonable probability approach made it very difficult for defendants to have their sentence overturned, noting that plain error review was meant to be very tough.⁶¹ Indeed, it would be rare for defendants to have tangible evidence that they would have received a lower sentence under advisory guidelines as judges would be unlikely to opine on such an issue under mandatory guidelines.

In the middle of these two positions is the limited remand approach. On the one hand, every defendant would have the opportunity for a new sentence if the district judge would have imposed a different sentence under advisory guidelines. But there was no guarantee that the district judge would rule differently, meaning some undetermined number of cases would be resentenced. This would have an effect on criminal defendants somewhere between the pro-defendant presumption of prejudice and the anti-defendant reasonable probability approach. Accordingly, we would expect conservative judges to adopt the reasonable probability approach and liberal judges to adopt a presumption of prejudice. More moderate judges may be more likely to advocate the limited remand.

The presumption of reasonableness issue can also be seen in light of the consequences on criminal defendants. It is important to note the context of this issue is

⁶⁰ *Barnett*, 398 F.3d at 529.

⁶¹ *Rodriguez*, 398 F.3d at 1299.

defendants appealing their sentences in hopes of getting them overturned as unreasonable. Accordingly, a presumption of reasonableness would work against criminal defendants. The presumption was rebuttable, but the burden was on a defendant to do so. Furthermore, the courts admitted that it would be very difficult and uncommon to rebut the presumption.⁶² Defendants would not have this structural burden in courts that did not adopt a presumption of reasonableness. Here, reasonableness review would take on a more holistic nature. Courts would examine all the statutory factors as a whole, instead of a more guideline focused approach.⁶³ As a result, defendants would have an easier time convincing the court that their within guideline sentence was in fact unreasonable. Still, despite this procedural difference, even the courts that rejected a presumption suggested that within guideline sentences would be very likely to be reasonable, meaning the practical effect may be subdued. Nevertheless, given this view of ideology, conservative judges would be more likely to adopt a presumption of reasonableness, while liberal judges would be more likely not to adopt a presumption.

The effects on defendants are also fairly plain on the crack-cocaine issue. Judges who were bound by the guideline would generally be compelled to hand out higher sentences based on the ratio. Additionally, the continued use of the guideline would perpetuate all the ills, injustices, and disparities for defendants as chronicled by the USSC. Judges who deviated from the ratio did so in a way that garnered more lenient sentences for criminal defendants. Thus, holding that judges did not have to follow the ratio would likely be beneficial to defendants. From this, we would expect conservative judges to require adherence to the guideline and liberal judges to allow rejecting it.

⁶² *Mykytiuk*, 415 F.3d at 608.

⁶³ *Cooper*, 437 F.3d at 330.

Legalism and Pragmatism

The prevalence of ideology in explaining judicial decision making does not preclude legal factors from having an effect. Much of the work relating to the lower courts and the law has focused on the role of precedent and the relationship between lower courts and higher courts.⁶⁴ This thesis takes a broader view of the role of the law by looking at pragmatism and legal formalism, or legalism. These two theories of judicial behavior are in some degree of tension with each other. Legal formalists base their decisions on legal rules and methods such as the texts of statutes and constitutions, precedent, logical methods, rules of interpretation, and broader interpretive theories such as originalism.⁶⁵ In this theory, the judge is bound by preexisting rules and merely applies these rules to discover the correct outcome.⁶⁶

Pragmatism tends to focus more on the effects of a decision than the legal rules governing it. Here, the judge strives to choose the best outcome in terms of the effect on society, regardless of legal rules. In essence, “The law is a means to an end or an instrument for the social good.”⁶⁷ The pragmatist allows for a multitude of arguments and information from a diverse range of disciplines that would be off limits to the legalist.⁶⁸

The goals of pragmatism and legalism in their purest incarnations are certainly at odds with each other. However, in the reality of judicial decision making, both theories are blended together to some degree. Even formalists, bound by a mass of legal rules, are

⁶⁴ See Cross, “Appellate Court Adherence to Precedent.” and Klein and Hume, “Fear of Reversal as an Explanation of Lower Court Compliance.”

⁶⁵ Frederick Schauer, “Formalism,” 97 *Yale Law Journal* 509 (1998).

⁶⁶ Posner, *How Judges Think*, 41-42.

⁶⁷ Brian Tamanaha, “How an Instrumental View of Law Corrodes the Rule of Law,” 56 *DePaul Law Review* 469.

⁶⁸ Posner, *How Judges Think*, 42.

often left with discretion over what rules to apply and how exactly to apply them.⁶⁹ Often, there is no clear, deductive answer of what the law requires and in these cases pragmatic reasoning may decide how the judge applies the rules of law and what the ultimate outcome is. Similarly, even ardent pragmatists would concede that they are bound by at least some legal rules. In many cases, these more moderate versions of the two theories may reach the same outcome, “But a space will be left in which a legalist methodology might produce substantive policies that would make many pragmatist judges gag.”⁷⁰ It is important to note that there is some degree of overlap between pragmatism and ideology. After all, the ultimate pragmatic judgment is that of the best policy outcome, which will largely be dependent on a judge’s ideological policy preferences.

Despite the fusion of formalism and pragmatism in much of the sphere of judicial decision making, the weighty policy issues and important legal rules of the Federal Sentencing Guidelines may create an area where there are substantive differences between formalists and pragmatists. Indeed, many of the arguments for and against the constitutionality of the Guidelines were decidedly formalist or pragmatist in nature. Circuit courts that ruled against the Guidelines felt themselves bound by *Blakely*, as the Federal Sentencing Guidelines were fundamentally indistinguishable from the state guidelines that the Supreme Court struck down.⁷¹ Here, the judges considered themselves bound by the precedent of a higher court, a formalist principle. But even beyond precedent, the underlying basis of the entire line of cases starting with *Apprendi* was based largely on the Sixth Amendment legal rule that “every defendant has the *right* to

⁶⁹ Tamanaha, “How an Instrumental View of Law Corrodes the Rule of Law.”

⁷⁰ Posner, “How Judges Think,” 49.

⁷¹ *Booker*, 375 F. 3d at 511.

insist that the prosecutor prove to a jury all facts legally essential to the punishment.”⁷²

This rule was in part based on the originalist notion of “the historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties.”⁷³

Judges also used legalist principles in defending the Guidelines. The combination of precedent and a legal principle underpinned one of the key arguments for upholding the Guidelines. Existing precedent allowed judicial factfinding under mandatory Guidelines. When coupled with the legal rule that only the Supreme Court could overrule one of its own decisions, the law seemed to compel upholding the Guidelines.⁷⁴

But the pragmatic reasons for upholding the Guidelines really seemed to be the driving force. Judges seemed to be fundamentally worried about the effects striking down the Guidelines would have on the entire criminal justice system. These judges admitted that *Blakely* probably meant the Guidelines were unconstitutional. But nevertheless, they were reluctant to strike them down due to the sweeping change and uncertainty that would permeate every sentencing case.⁷⁵ Based on these arguments, pragmatists would be more likely to uphold the Guidelines, as the pragmatic reasons for doing so were stronger and more prevalent. Formalist principles were present on both sides; however, they seemed to dominate more in arguments for striking down the Guidelines. Therefore, we would expect formalists to be more likely to strike down the Guidelines.

In his remedial opinion, Justice Breyer stated that not every pending case warranted resentencing and directed appellate courts to use “ordinary prudential

⁷² *Blakely*, 542 U.S. at 313.

⁷³ *Apprendi*, 530 U.S. at 482.

⁷⁴ *Booker*, 375 F. 3d at 516.

⁷⁵ *Booker*, 375 F. 3d at 516, 521.

doctrines,” namely the plain error test.⁷⁶ Justice Breyer’s opinion provides a useful means for analyzing the legalist and pragmatist arguments on this issue. The reasonable probability outcome was likely the most legalist in nature. It conformed to Justice Breyer’s assertion that not every case required resentencing and was also the most conventional application of the plain error doctrine.

The courts that adopted a presumption of prejudice also used precedent to justify their decision by noting the Supreme Court expressly allowed for a presumption of prejudice under certain instances.⁷⁷ But this outcome remanded virtually every case for resentencing, which was inconsistent with Justice Breyer’s remedial opinion. Judges who adopted this outcome seemed to be concerned about the effect on criminal defendants. Given the nature of *Booker*, requiring defendants to show a reasonable probability their sentence would have been different would have been just too harsh on defendants.⁷⁸ This focus on the effects was assuredly pragmatic in nature.

But even more pragmatic than this was the limited remand outcome. This was incredibly novel and was far from “ordinary prudential doctrines.” The reasons for this outcome were almost exclusively pragmatic as judges stressed the efficiency and the certainty of the limited remand.⁷⁹ From this, legalists would be more likely to choose the reasonable probability outcome. Pragmatists would be likely to adopt either the presumption of prejudice or the limited remand outcome. But given the almost purely pragmatic nature of the limited remand, stronger pragmatists would be likely to choose that outcome.

⁷⁶ *Booker*, 543 U.S. at 268.

⁷⁷ *Olano*, 507 U.S. 725.

⁷⁸ *Barnett*, 398 F.3d at 528.

⁷⁹ *Paladino*, 401 F.3d at 483.

Unlike the previous two issues, the presumption of reasonableness issue did not have much relevant precedent. Nevertheless, pragmatist and legalist principles seemed to emerge on both sides. A crucial basis for adopting a presumption of reasonableness was that ultimately, the Guidelines were good policy and for the vast majority of cases a within guideline sentence would be reasonable.⁸⁰ These courts knew that adopting such a presumption would likely have the effect of generating a greater proportion of within guideline sentences and they seemed to feel this was a positive consequence. The courts that declined to adopt a presumption of reasonableness rested their decisions on more legalist grounds. They focused on the statutory factors governing federal sentencing and felt that a within guideline sentence did not guarantee that all these statutory factors were fulfilled.⁸¹ Moreover, a major concern of these judges was the legal implication of adopting a presumption of reasonableness. They felt this would unduly move in the direction of mandatory guidelines, which would undermine the legal principle that *Booker* stood for.⁸² Therefore pragmatists would be more likely to adopt a presumption of reasonableness than formalists.

The crack-cocaine issue can also be evaluated in the framework of pragmatism and legalism. The courts that did not require judges to follow the ratio stressed the abject policy failures of the guideline and its inability to meet the statutory purposes of sentencing. This relied on the reports of the USSC and was largely pragmatic in that it was making a judgment on the policy effects of the guideline.⁸³ These courts also, however, rested their decisions on legal grounds, namely the legal principle that all of the

⁸⁰ *Johnson*, 445 F.3d at 341.

⁸¹ *Cooper*, 437 F.3d at 330.

⁸² *Jimenez-Beltre*, 440 F.3d at 518.

⁸³ *Pickett*, 475 F. 3d at 1354.

Guidelines were advisory.⁸⁴ The main argument of the courts requiring judges to follow the ratio was in essence a legal argument about the separation of powers. These courts ruled that deviating from the ratio unduly supplanted Congress' authority to define the proper penalty for an offense.⁸⁵ These courts augmented this argument with pragmatic arguments as well by stressing the potential disparities since a sentence could vary greatly based on what particular judge handled the case.⁸⁶ The prevalence of both legalist and pragmatist arguments on both sides makes it unclear as to which side each would favor. There are plausible reasons to choose either side for both legalists and pragmatists.

Economic Theory

Economic theories of judicial behavior characterize the judge as “a rational, self-interested utility-maximizer.”⁸⁷ The judge has some utility function that he seeks to maximize. Numerous factors have been used in the judicial utility function such as power, income, leisure, prestige, avoiding reversal, reputation, and the intrinsic pleasure of judging.⁸⁸ This thesis focuses on the leisure aspect of judicial utility. The presence of leisure as a source of utility suggests that judges may act in a way that simplifies and reduces their future workloads. A more formal explication of this is that “the judge will allocate his time between leisure and judging so that the last hour devoted to judging yields him the same utility (from judicial voting) as the last hour devoted to leisure.”⁸⁹ One would not expect the typical sentencing appeal to generate a whole lot of judicial

⁸⁴ *Pickett*, 475 F. 3d at 1353.

⁸⁵ *Pho*, 433 F.3d at 63.

⁸⁶ *Pho*, 433 F.3d at 63.

⁸⁷ Posner, *How Judges Think*, 35.

⁸⁸ Posner, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does).”

⁸⁹ Posner, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does),” 31.

utility. These are generally not the blockbuster cases that affect such elements of judicial utility as power, prestige, and reputation.

Thus, judges would be expected to have a general leisure preference in this area of law, since the utility derived from an additional hour of handling sentencing appeals will likely be less than the utility derived from an extra hour of leisure time. Based on the economic principle of diminishing marginal utility, this would be amplified for judges who already have higher relative workloads. Diminishing marginal utility suggests that the additional utility from doing something will decrease as that activity is done more and more. For example, a hungry person likely derives more utility from his first slice of pizza than say his seventh. For judges with higher workloads, more of their time is allocated to judging and less to leisure. Therefore, they would gain more in utility from a little bit of extra leisure time than a judge with a lower workload who already has more leisure time. To examine the economic model in the context of the Federal Sentencing Guidelines it is necessary to determine the effects of the various outcomes on future workload, both in terms of sheer numbers and simplicity. This can be seen in two ways: if judges show a general preference for outcomes that reduce their future workload and if this is stronger for judges with higher workloads.

The choice to strike down the Guidelines carried tremendous implications for the workloads of appellate judges as it opened an altogether new avenue for criminal defendants to appeal their sentences. Thus, striking down the guidelines would likely create a flurry of appeals. Not only would the number of appeals likely increase, the complexity and difficulty of those appeals would increase also. Holding *Blakely* to apply to the Guidelines answered one question, but it raised many more. Judges had the option

to impose a within guideline sentence, submit the facts necessary for an above guideline sentence to a sentencing jury, or perhaps even disregard the Guidelines entirely.⁹⁰ Any way they acted would likely raise new legal questions. Sentencing juries were a novel institution and accordingly, the specific procedures relating to their operation would likely creating many new legal issues for the appellate courts to sort out.

The “doctrinal uncertainty” led the 2nd Circuit to go so far as to make the rare move of certifying the question of whether or not the Guidelines were constitutional to the Supreme Court. The court noted that if courts decided to apply *Blakely*, it was “without guidance as to the means of achieving compliance.”⁹¹ Choosing to uphold the Guidelines would avoid all of this and maintain the existing system that had been in place for many years. Thus, under the economic theory of judicial behavior, we would expect judges to uphold the Guidelines. This would be especially true of judges with already high workloads.

The choice of doctrine on the plain error issue determined how easy it was to dispose of these cases and the potential for future appeals. The reasonable probability outcome made it easy for appellate courts to handle these cases and almost foreclosed the potential for future appeals. Therefore in the vast majority of cases courts could simply affirm the sentence without much work.⁹² But perhaps the bigger impact on workload came from the fact that these cases (barring the incredibly rare prospect of review by the Supreme Court) were final, with no potential for another future appeal.

This was different than the presumed prejudice approach. Presuming prejudice allowed judges to dispose of cases easily in the first instance as it had the effect of

⁹⁰ *Booker* 375 F. 3d at 515.

⁹¹ *United States v. Penaranda*, 375 F.3d 238, 246 (2nd Cir. 2004).

⁹² *Rodriguez*, 398 F.3d at 1299.

remanding virtually every case.⁹³ But unlike the reasonable probability outcome, after resentencing, these cases would very likely be appealed to the circuit courts for reasonableness review. This outcome created a greater future workload than the reasonable probability outcome.

The effects on workload were more unclear for the limited remand outcome and largely depended on how likely district court judges were to impose a different sentences under advisory guidelines. It was simple enough to remand every case to the lower court to determine whether or not sentencing would have been different. If most judges decided the sentence would not have been different, then the appellate court would affirm the sentence and the effect on future workload would be similar to the reasonable probability outcome. However, if a significant number of judges would have imposed a different sentence, appellate courts would have to remand the case for resentencing and likely review the new sentence for reasonableness later down the road. Given the certainty of the effect of the reasonable probability approach on workload, the economic model suggests that judges would prefer this outcome. We would expect the presumption of prejudice outcome to be the least preferred overall. We would also expect the judges who do prefer it, to have lower workloads than other judges.

The presumption of reasonableness issue determined the ease with which appellate courts could dispose of appeals of within guideline sentences. Adopting a presumption of reasonableness made it quite easy to affirm these sentences. The onus of rebutting the presumption was on the defendant, and this was an admittedly difficult thing to do.⁹⁴ This made it easier to dispose of a large class of cases, since following *Booker*, a

⁹³ *Barnett*, 398 F.3d at 528.

⁹⁴ *Mykytiuk*, 415 F.3d at 608.

large majority of cases continued to be sentenced in accordance with the Guidelines.⁹⁵ Not adopting a presumption of reasonableness entailed a more exacting review of every case, which would likely consume more time.⁹⁶ It was also possible for a presumption of reasonableness to reduce future workload, as it resulted in the affirmance of significant number of cases that were then very likely final. It was possible that a more rigorous review would yield more unreasonable sentences that would have to be remanded and then likely appealed again to the circuit court. Therefore, we would expect judges to adopt a presumption of reasonableness.

Requiring judges to adhere to the crack-cocaine ratio made dealing with appeals fairly straightforward. If judges did conform to the ratio, there was no legal error and given the presumptive reasonableness of the Guidelines, the sentence would likely be affirmed. If appellate courts allowed judges to deviate from the ratio based on policy differences, they had a more demanding inquiry. Different judges could make different substitutions and alterations to the guideline, which would result in a diverse and challenging set of factors for appellate courts to evaluate. The effect on future workload depended on how many district judges felt bound by the guideline. If this proportion was high, then allowing policy disagreements would result in more cases being remanded. However, if not many judges felt bounded by the guideline, then requiring them to follow it would result in more cases being remanded. The effects on future workload are unclear, but the difference in the easiness of actually dealing with appeals suggests that judges would prefer requiring district court judges to follow the Guideline.

⁹⁵ United States Sentencing Commission, *Final Report on United States v. Booker On Federal Sentencing*, 109th Cong., 2nd sess., (Washington DC, 2006).

⁹⁶ *Fernandez*, 443 F.3d at 28.

District Court Experience

There is no specific theoretical basis to expect district court experience to have an impact on judicial decision making in this area. Instead, the mere structure of federal sentencing suggests that it may be relevant. District court judges are responsible for imposing the actual sentence. It is possible that having this experience may give appellate judges a different set of motivations and concerns in deciding issues relating to the Guidelines.

Some district judges have expressed their opposition to the Guidelines because they unduly constrain their discretion in sentencing. For example, Judge Nancy Gertner of the U.S. District Court of Massachusetts felt the Guidelines' focus on criminal history and the nature of the offense was too narrow and did not allow for other considerations that she felt were essential to determining a sentence.⁹⁷ Judges with district court experience who agree with Gertner would be likely to rule in a way that made the guidelines as advisory as possible.

It would make sense for these judges to strike down the Guidelines as they would have less formal constraints from departing from them. On the plain error issue, the presumption of prejudice outcome was the one that likely weakened the Guidelines most. Since virtually every sentence was remanded, district courts would be forced to resentence under advisory guidelines. Procedurally this would be more aligned with what these judges think and substantively it had the greater potential for departures from the Guidelines. A presumption of reasonableness clearly strengthened the hold of the Guidelines, and therefore these judges would oppose it. Similarly, allowing district court

⁹⁷ Nancy Gertner, "Federal Sentencing Guidelines: A View From the Bench," *Human Rights Magazine*, 2002, <http://www.abanet.org/irr/hr/spring02/gertner.html> (accessed April 24, 2009).

judges to disagree with the crack-cocaine guideline afforded them significantly more discretion.

Table 5. Predicted Outcomes Based on Independent Variables

Explanation	Issue			
	<u>Const. of Guidelines</u>	<u>Plain Error</u>	<u>Presumption of Reasonableness</u>	<u>Crack-Cocaine</u>
<u>Ideology</u>				
Liberal	Unclear	Presumption of Prejudice	No Presumption	Do Not Have to Follow
Conservative	Unclear	Reasonable Probability	Presumption	Must Follow
<u>Leg./Prag.</u>				
Legalist	Unconstitutional	Reasonable Probability	No Presumption	Unclear
Pragmatist	Constitutional	Limited Remand	Presumption	Unclear
<u>Economic</u>	Constitutional	Reasonable Probability	Presumption	Must Follow
<u>District Court Experience</u>	Unconstitutional	Presumption of Prejudice	No Presumption	Do Not Have to Follow

Methodology

This thesis identifies and codes the positions of appellate court judges on four issues: the constitutionality of the guidelines, plain error, presumption of reasonableness, and the crack-cocaine guideline. It examines ideology, workload, whether a judge is a legalist or pragmatist, and district court experience as potential explanatory variables. Logistical regression analysis was then run with the position of appellate judge as the dependent variable and the aforementioned independent variables. For relationships that approached or achieved statistical significance, probability estimates were run. These estimates show the likelihood that a judge would choose an outcome if he had a certain value of the relevant independent variable. Careful analysis of the opinions in these cases augmented the statistical methods used.

Case selection was limited to cases that directly and thoroughly reasoned through these issues. Courts of appeals commonly established their position in one or two cases, and then merely applied it to subsequent cases. For example, the 2nd Circuit adopted and justified the limited remand approach in *United States v. Crosby* and in subsequent cases would simply “remand in accordance with *United States v. Crosby*...”⁹⁸ These cases became known as “*Crosby* remands.”⁹⁹ This was true across the other circuits as well. This thesis does not look at these subsequent cases as often, they had little substantive reasoning. Regardless of their initial views, judges would generally fall in line with whatever approach the court adopted. Including these cases would not aid in examining judicial behavior and would likely dilute the findings.

Admittedly, there is some subjectivity in choosing cases and it is possible that the cases selected are not exhaustive. But every case selected thoroughly sets forth the reasons for adopting a particular outcome. An invaluable resource in identifying these cases was Ohio State law professor Douglas A. Berman’s *Sentencing Law and Policy* blog. Professor Berman does an amazingly thorough job chronicling the developments in sentencing law and accordingly, his analysis of cases was incredibly useful in finding appropriate cases. Additionally, for the presumption of reasonableness and crack-cocaine issues, the Supreme Court noted the relevant circuit splits and provided citations for cases that addressed the issues.¹⁰⁰

These cases were read carefully to determine each judge’s position on the issue. The majority opinion and any concurrences or dissents were analyzed and an outcome

⁹⁸ *United States v. D’Oliveira*, 402 F.3d 130 (2nd Cir. 2005).

⁹⁹ See Douglas A. Berman, “Interesting *Crosby* Remand From the Second Circuit” *Sentencing Law and Policy*, April 20, 2005, http://sentencing.typepad.com/sentencing_law_and_policy/2005/04/interesting_cro.html.

¹⁰⁰ *Rita*, 551 U.S. at 346; *Kimbrough*, 552 U.S. at ____ n.4.

was attributed to each. The judge who wrote a given opinion and any judges who joined it were attributed the corresponding outcome. The outcomes were based strictly on doctrine and not the ultimate choice of whether resentencing was warranted. A judge who agreed with the majority on doctrine could still dissent if he felt their application of it was wrong. Similarly, a judge who agreed whether or not a case should be resentenced could disagree completely over the reason why. Once these positions were attributed, they were assigned a numerical value to make them suitable for statistical analysis. No rank was implied in the number.

Ideology was measured by the judge's common space score, a more sophisticated alternative to merely using the appointing president's party. The judicial common space score is built on scores for elected officials, namely presidents, senators, and representatives. These scores are based on votes in both chambers of Congress and explicit presidential intentions. The judge is assigned the score of a particular elected official based on various scenarios. For example, if the judge's home state has a senator who is the same party as the president, the judge is assigned the senator's score. If both senators from the home state are the same party as the president, the average of the two scores is used. Finally, if neither home state senator is the same party as the appointing president, his score is used. This method of assigning ideological scores to judges accounts for the idea of senatorial courtesy, that is sometimes present in lower court appointments. Often for these vacancies, presidents will consult with home state senators of the same party and ensure they approve of the nominee.¹⁰¹ Therefore, it is suitable to use the senators' scores in these instances.

¹⁰¹ Micheal W. Giles, Virginia A. Hettinger, and Todd Peppers, "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas," *Political Research Quarterly* 54, no. 3 (September 2001): 623-641.

Common space scores range from -1 to 1 with a negative score meaning a judge is liberal.¹⁰² The quantitative nature of the common space score is an advantage over merely using the political party of the appointing president to measure ideology. The categorical labels Republican and Democrat do not capture any gradations among liberals and among conservatives. A very conservative or liberal judge is treated the same as a moderate conservative or liberal judge. The common space score allows for sharper measurement of ideology and puts all judges on a uniform scale.

There are no conventional measures of pragmatism and legalism. Most judges are reluctant to attribute such labels to themselves and it would be difficult to accurately glean such leanings from opinions for this many judges. This thesis uses the absolute value of the common space score as a proxy for whether a judge is more pragmatist or legalist. The absolute value of the common space score is properly understood as a measure of ideological extremism. A higher value, meaning greater ideological extremism represents legalists. A lower score, meaning more ideological moderation, represents pragmatists. Admittedly, ideological extremism is not a perfect measure of pragmatism and legalism. Still, it does provide some useful means of quantitatively measuring a difficult to measure variable.

There is anecdotal evidence that it may be an appropriate measure to use. There are some prominent federal judges who have voiced their pragmatist or formalist tendencies. It is instructive to look at their common space scores. Judge Richard Posner explicitly describes himself as a pragmatist, and is one of the ardent voices for

¹⁰² Lee Epstein et al., "The Judicial Common Space," *Journal of Law, Economics, and Organization* 23, no. 2 (2007): 303.

pragmatism.¹⁰³ Posner's common space score is a very moderate 0.014. Posner describes his colleague on the 7th Circuit, Judge Frank Easterbrook, as a legalist. Indeed, this appears to be accurate given Easterbrook's scholarly work. For example, he has written, "That decision by rule is a benefit cannot be doubted."¹⁰⁴ Easterbrook's common space score is 0.581, one of the most conservative and one of the highest absolute values. The pragmatist Posner has a very small absolute value, while the legalist Easterbrook has a very large absolute value. Of course these are just two judges out of many more. But these two judges suggest that there is some basis for using ideological extremism as a measure for legalism and pragmatism.

The measure used for judicial workload was the number of terminations on the merits by circuit per judge for the year 2007.¹⁰⁵ This was the most recent data when the analysis was done. This measure was different for each circuit. Therefore judges on the same circuit were all attributed the same value. The number of terminations on the merits is a broad measure that is proper for capturing how hard judges are working. Given the economic theory of judicial behavior, which contemplates the overall time spent judging, it is appropriate to use this more encompassing measure than a narrower one such as criminal appeals or sentencing appeals.

To determine whether a judge had district court experience, biographical data from the Federal Judicial Center was used.¹⁰⁶ To utilize this information for statistical analysis, a numerical value was given to each judge based on district court experience.

¹⁰³ Posner, *How Judges Think*, 346.

¹⁰⁴ Frank H. Easterbrook, "Abstraction and Authority," 59 *University of Chicago Law Review* 349 (1992).

¹⁰⁵ "Federal Court Management Statistics – 2007," U.S. Courts. <http://www.uscourts.gov/cgi-bin/cmsa2007.pl>.

¹⁰⁶ "Judges of the United States Courts," Federal Judicial Center. <http://www.fjc.gov/public/home.nsf/hisj>.

Table 6. Measures of Independent Variables

Variable	Measure
Ideology	Common Space Score
Pragmatism/Legalism	Absolute Value of Common Space Score
Workload	Terminations on the merits per judge for 2007, by circuit
District Court Experience	Biographical data from Federal Judicial Center

Logistical regression analysis was run for each issue with the judge's position as the dependent variable and the independent variables as measured above. Multinomial logistical analysis was used on the plain error issue since it had three potential outcomes. This became standard logit analysis for the other issues with only two outcomes. For statistically significant relationships and nearly statistically significant relationships, probability estimates were run. Statistical significance was measured at the 95% level for a two-tailed test corresponding to a z-score of 1.96 in absolute value terms. There is, of course, a degree of subjectivity in choosing to run probability estimates for relationships that were not quite statistically significant. There was no specific cutoff, but the lowest z-score in absolute value terms for which probability estimates were run was 1.60.

These probability estimates show the likelihood of a judge supporting an outcome if he was to have a certain value of the relevant independent variable. For ordinal variables, such as the common space score, the absolute value of the common space score, and workload, the values used in the probability estimates were one standard deviation above and below the mean value of the relevant variable. For district court experience, a nominal variable, simply the maximum and minimum values, which correspond to either having district court experience or not, were used. All other variables were held constant at their means for probability estimates of a specific variable. It is possible that the probability estimates for variables that were close, but not quite

statistically significant are not very reliable. The 95% confidence interval for these estimates has been included. If there is a fair degree of overlap in probabilities for a given value of a variable, the estimates may not be very useful.

Results

Constitutionality of the Guidelines

For the constitutionality of the Guidelines issue, the only independent variables that reached or came close to statistical significance were ideology and workload. Ideology achieved statistical significance at the 95% level, while workload fell a little short. The probability estimates for these two variables illustrate their effects on decision making.

Table 7. Regression Results for Constitutionality of Guidelines

Variable	Coefficient	Std. Error	z-Score	P > z	95% Confidence Int.	
District Ct.	-.0140649	.9895021	-0.01	0.989	-1.953453	1.925324
Ideology	-3.577291	1.360165	-2.63	0.009	-6.243165	-.9114163
Leg./Prag.	-2.522111	3.820908	-0.66	0.509	-10.01095	4.966731
Workload	-.0046802	.0028835	-1.62	0.105	-.0103317	.0009713
Constant	2.488971	2.123612	1.17	0.241	-1.673232	6.651174

Table 8. Probability Estimates for Ideology

Outcome	Liberal		Conservative	
	Mean	95% Confidence Interval	Mean	95% Confidence Interval
Constitutional	.43	.18-.70	.90	.69-.99
Unconstitutional	.57	.30-.82	.10	.01-.31

As Table 8 shows, ideology appears to have a significant effect on the behavior of conservative judges. They have a very high probability of upholding the Guidelines and a very low probability of striking them down. This suggests that conservatives see the

Guidelines as anti-defendant. Therefore, affording defendants the additional right to jury determination of some sentencing facts and the potential for lower sentences under non-binding guidelines seem to be the relevant policy issues for conservative judges.

Ideology does not strongly distinguish liberal judges, who are split far more evenly. There is a large degree of overlap in the probabilities for each outcome suggesting that a liberal judge could plausibly go either way. This may represent the uncertainty of the effects on criminal defendants. Liberals may have different perceptions over which outcome will benefit defendants more. This does not mean that ideology is completely inert. If there is some general force, for example workload, that is pushing judges to overwhelmingly uphold the Guidelines, the fact that a significant majority of liberal judges defy that trend may mean that ideology is motivating them in a significant way.

Table 9. Probability Estimates for Workload

Outcome	Low Workload		High Workload	
	Mean	95% Confidence Interval	Mean	95% Confidence Interval
Constitutional	.61	.33-.83	.85	.60-.97
Unconstitutional	.39	.17-.67	.15	.03-.40

The probability estimates for workload in Table 9 seem to be somewhat consistent with the economic theory of judicial behavior. There seems to be a general preference for upholding the Guidelines. This is certainly true of judges with high workloads, who are very likely to uphold them. There is a fair amount of overlap for the probabilities of judges with low workloads, but there is enough difference to suggest that they might slightly be more likely to uphold the Guidelines. Striking down the Guidelines would likely increase future workload and lead to more complex cases. It therefore makes sense that judges overall would prefer to uphold the Guidelines. Furthermore, it makes sense

that judges with higher workloads would have an even higher probability of upholding the Guidelines. Since more of their time is already devoted to judging, they would gain more utility from added leisure time.

Table 10. Probability Estimates for Ideology with High Workload

Outcome	Liberal		Conservative	
	Mean	95% Confidence Interval	Mean	95% Confidence Interval
Constitutional	.59	.23-.89	.94	.77-1.00
Unconstitutional	.41	.11-.77	.06	.00-.23

Table 11. Probability Estimates for Ideology with Low Workload

Outcome	Liberal		Conservative	
	Mean	95% Confidence Interval	Mean	95% Confidence Interval
Constitutional	.27	.09-.55	.82	.51-.97
Unconstitutional	.73	.45-.91	.18	.03-.49

One way to disentangle the effects of ideology and workload is to look at probability estimates for ideology with a high workload and ideology with a low workload as shown in Tables 10 and 11. From this, we can see that conservative judges strongly uphold the Guidelines irrespective of workload. This confirms the view that ideology is their main motivation on this issue. This is not the case for liberal judges, for whom workload seems to have a very significant effect. Liberal judges with low workloads tend to significantly favor striking down the Guidelines. But this is hardly the case for liberal judges with high workloads, who favor upholding the Guidelines. Workload has such an effect that judges of the same ideology reverse their preferences given different workloads. This suggests that whatever explanatory power ideology may have for liberal judges, it is secondary to workload.

It is also important to discuss the variables that statistically, did not have a strong effect on judicial behavior. The implications from not having an effect are also interesting

and may shed light on the nature of judicial behavior in this area. Quantitatively, whether a judge was a legalist or a pragmatist did not have much of an effect. But the opinions in these cases were filled with pragmatist and legalist arguments, suggesting they are not totally irrelevant. It is possible that pragmatist and legalist arguments correlate strongly with ideology. If judges of one ideology overwhelmingly adopt legalist arguments while judges of the other ideology overwhelmingly adopt pragmatist arguments, the absolute value of the common score would not capture pragmatism and legalism properly. To be sure, it is possible that under this scenario, that pragmatist and legalist arguments are merely justifications for policy preferences. Furthermore, the fact that judicial workload seems to have some explanatory power may support the notion that pragmatism has influence in decision making. Many of the pragmatist arguments dealt with the consequences striking down the Guidelines would have on the functioning of courts. These same consequences would be relevant in the economic model of judicial behavior.

Past experience as a district court judge does not explain a whole lot. This would suggest that perhaps ideology and concerns over workload are overriding any factors specific to judges with district court experience. It may be case that judges with district court experience do harbor opposition to the Guidelines but concerns over workload in their current job are more pressing than those sentiments.

Plain Error

Since there were three potential outcomes on the plain error issue, multiple regressions had to be run to be able to compare all of the outcomes to each other. The base outcome was rotated and the other outcomes were compared to it. For the first two

sets of regression results, reasonable probability is the base outcome and the other two outcomes are being compared to it. The third set compares the presumption of prejudice outcome and the limited remand outcome. The results show that ideology appears to have a significant effect on choosing between the limited remand and reasonable probability outcomes. The only other variable to show anything near a statistically significant relationship was workload, when the reasonable probability and limited remand outcomes were compared. Probability estimates were run for these two variables.

Table 12. Regression Results for Plain Error

Variable	Coefficient	Std. Error	z-Score	P > z	95% Confidence Int.	
Reasonable Probability and Presumption of Prejudice						
District Ct.	.873143	.596277	1.46	0.143	-.2955384	2.041824
Ideology	-.8022534	.7734549	-1.04	0.300	-2.318197	.7136904
Leg./Prag.	-1.472839	1.853469	-0.79	0.427	-5.10557	2.159893
Workload	-.0021097	.001737	-1.21	0.225	-.0055141	.0012947
Constant	1.145725	.9686018	1.18	0.237	-.7526997	3.044149
Reasonable Probability and Limited Remand						
District Ct.	.7631935	.7187727	1.06	0.288	-.6455751	2.171962
Ideology	-2.139284	.8845503	-2.42	0.016	-3.872971	-.4055976
Leg./Prag.	-.2576204	2.184696	-0.12	0.906	-4.539545	4.024304
Workload	-.0037899	.0023637	-1.60	0.109	-.0084227	.0008428
Constant	.9418034	1.260718	0.75	0.455	-1.529159	3.412765
Presumption of Prejudice and Limited Remand						
District Ct.	-.1099495	.673177	-0.16	0.870	-1.429352	1.209453
Ideology	-1.337031	.8638543	-1.55	0.122	-3.030154	.3560924
Leg./Prag.	1.215218	2.066795	0.59	0.557	-2.835626	5.266062
Workload	-.0016803	.0023781	-0.71	0.480	-.0063413	.0029808
Constant	-.2039215	1.228802	-0.17	0.868	-2.61233	2.204487

Table 13. Probability Estimates for Ideology

Outcome	Liberal		Conservative	
	Mean	95% Confidence Interval	Mean	95% Confidence Interval
Reasonable Probability	.25	.13-.44	.51	.34-.69
Presumption of Prejudice	.37	.21-.55	.37	.21-.54
Limited Remand	.37	.22-.56	.12	.04-.26

The probability estimates for ideology in Table 13 do not explain a whole lot for liberal judges. They may slightly prefer the limited remand and presumption of prejudice outcomes, but not by a whole lot. Still, these are the two outcomes that are most pro-defendant. The estimates for conservative judges suggest that the most likely outcome for them is reasonable probability, which is consistent with what we would expect. But these judges are almost as likely to adopt a presumption of prejudice, which is the most pro-defendant outcome. These estimates suggest that liberal and conservative judges slightly favor the outcomes we would expect them to. But the fact that they also favor the opposite outcome by nearly as much suggests that ideology is not the main concern on this issue.

Table 14. Probability Estimates for Workload

Outcome	Low Workload		High Workload	
	Mean	95% Confidence Interval	Mean	95% Confidence Interval
Reasonable Probability	.27	.14-.45	.43	.31-.55
Presumption of Prejudice	.40	.23-.60	.38	.27-.51
Limited Remand	.32	.15-.53	.19	.10-.32

In Table 14, the probability estimates for workload suggest that the presumption of prejudice outcome is the most likely for judges with low workloads and the reasonable probability outcome is the most likely for judges with high workload. This is consistent with our expectation that judges with higher workloads will be more likely to adopt an outcome that reduces their workloads. But still, these probabilities are not that much greater than the other outcomes. Judges with high workloads do favor the reasonable probability and presumption of prejudice outcomes more than the limited remand. This suggests that they preferred the ease with which they could deal with cases in those two methods, by either remanding or affirming virtually all cases. It is true under a

presumption of prejudice they would likely have to hear these cases again on appeal. But perhaps these judges expected most of them to be within guideline sentences anyway, meaning they could affirm them fairly easily. That judges with low workloads are more likely to adopt outcomes with higher future workloads is consistent with the economic theory of judicial behavior.

Pragmatism and legalism do not seem to seem to explain much statistically. It may be the case that the absolute value of the common space score is not the best measure of pragmatism or legalism. It may be the case that pragmatism correlates with ideology in such a way that liberal judges tend to be more pragmatic and conservative judges more formalistic. The probability estimates for ideology tend to support this. Liberal judges are fairly more likely to adopt the limited remand, surely the most pragmatic outcome, than conservative judges. The fact that the limited remand probability is very near the presumption of prejudice probability, the most liberal, suggests that at least some liberal judges are sacrificing ideological concerns for pragmatic ones. These probability estimates also support the notion that conservatism may correlate with legalism, since conservatives were much more likely to choose the two outcomes that were most grounded in the law.

District court experience once again does not seem to have much of an effect. This is interesting since the effects on district courts were quite different for the various outcomes. The presumption of prejudice and limited remand approaches guaranteed many remands to the district courts. Meanwhile, the reasonable probability approach resulted in very few. It is likely that for judges with district court experience, these effects were secondary to the effects on their own workloads. Of all the issues, the plain error

issue was the one that dealt the least with the fundamental question of how advisory the Guidelines would be. This may be why district court experience was not particularly relevant here. In a sense, the issue had an expiration date once all the cases in the *Booker* pipeline were dealt with. Therefore, the future implications for the role of the Guidelines were diminished.

Presumption of Prejudice

District court experience was the only independent variable to show a statistically significant relationship on the presumption of reasonableness issue. This is interesting since it does not really show up in any other issue.

Table 15. Regression Results for Presumption of Reasonableness

Variable	Coefficient	Std. Error	z-Score	P > z	95% Confidence Int.	
District Ct.	2.210209	.9371343	2.36	0.018	.3734593	4.046958
Ideology	-1.267974	1.197107	-1.06	0.290	-3.61426	1.078312
Leg./Prag.	-2.636397	2.403243	-1.10	0.273	-7.346667	2.073873
Workload	-.0017188	.0017777	-0.97	0.334	-.005203	.0017654
Constant	-.0338156	1.262858	-0.03	0.979	-2.508972	2.441341

Table 16. Probability Estimates for District Court Experience

Outcome	Experience		No Experience	
	Mean	95% Confidence Interval	Mean	95% Confidence Interval
Presumption	.46	.22-.70	.87	.67-.96
No Presumption	.54	.30-.78	.13	.04-.32

The probability estimates in Table 16 suggest that having district court experience makes judges much more likely not to adopt a presumption of reasonableness. Judges without this experience are very likely to adopt a presumption of reasonableness. Having district court experience reduces this likelihood dramatically, to the point where a judge could reasonably go either way, or possibly be even slightly more likely to not adopt a

presumption. This would seem to be consistent with district court judge antipathy toward the Guidelines. Adopting a presumption of reasonableness would clearly entrench the Guidelines and provide an incentive for district court judges to impose sentences in accordance with them. Judges with district court experience would be more likely to loosen the pull of the Guidelines, which on this issue would be not adopting a presumption of reasonableness. The question remains why district court experience has an effect only on this issue. The constitutionality of the Guidelines would seem to be the issue most relevant to district court discretion. It is possible the appellate workload concerns were more striking on that issue. Perhaps judges felt the effect on appellate workload would not be as large on this issue.

None of the other independent variables showed a meaningful relationship on the presumption of reasonableness issue. One potential explanation for this is that a strong majority of judges voted to adopt a presumption of reasonableness. Given this majority, there was not as much variation for these variables to explain.

Table 17. Voting Patterns of Judges on Presumption of Reasonableness

Outcome	Percent of Judges	Number of Judges
Presumption	29%	12
No Presumption	71%	30

The strong preference for adopting a presumption of reasonableness as shown in Table 17 does lend some support for notion that judges act in a way that reduces and simplifies their future workload. Adopting a presumption of reasonableness certainly would have this effect, and judges show a strong preference for adopting it. Of course, there could be other reasons for this preference, but its presence does support one principle of the economic theory of judicial behavior. The lack of a statistically

significant relationship for judicial workload suggests there is little difference between judges with higher workloads and judges with lower workloads. So, it would not necessarily be the case that judges with higher workloads are more likely to adopt a presumption of reasonableness. But nevertheless, the overall partiality for a presumption of reasonableness is consistent with an economic view of judicial decision making.

Ideology does not seem to matter much here. Once again, this could be because there is a strong overall proclivity for a presumption of reasonableness that is irrespective of ideology. If concerns over workload are driving this penchant, then we can infer that these concerns trump any ideological concerns. A potential reason for this is that even courts that did not adopt a presumption of reasonableness suggested that a within guideline sentence would still be very likely to be reasonable despite a more exacting review. This suggests that it was possible that not adopting a presumption of reasonableness was functionally not as beneficial to defendants as it might appear to be. With these ideological effects diminished, other forces such as workload concerns could take precedence.

There does not appear to be an appreciable difference between legalists and pragmatists on this issue. This is not to completely discount the role of the law for judges who chose not to adopt a presumption of reasonableness. Many of them admitted the effect of adopting a presumption, namely the strong likelihood of affirming within guideline sentences, would be the same effect of not adopting a presumption. Yet they still chose an outcome that would require more work of them. These judges would seem to be strongly affected by the law as they chose an outcome that requires more work to get the same result for reasons that are legal in nature. Legalism is then relevant for this

small class of judges. But it seems more judges were swayed by other forces. It may be the case that pragmatic arguments, such as the fact that adopting a presumption would make it very easy to affirm within guideline sentences, served as the impetus for most judges to conform to the economic theory of judicial behavior and simplify their future workload.

Crack-Cocaine

None of the variables even approached statistical significance on the crack-cocaine issue. This is possibly due to a relatively small sample size and does not necessarily mean that all of these variables are irrelevant. It is still worthwhile to look at how judges voted on this issue and when coupled with careful analysis of the opinions, this can provide insight into judicial behavior on this issue.

Table 18 Regression Results for Crack Cocaine

Variable	Coefficient	Std. Error	z-Score	P > z	95% Confidence Int.	
District Ct.	-33.06305	2.49e+07	-0.00	1.000	-4.87e+07	4.87e+07
Ideology	-2.548962	1.867648	-1.36	0.172	-6.209485	1.11156
Leg./Prag.	8.479764	7.01195	1.21	0.227	-5.263406	22.22293
Workload	-.0044021	.0039338	-1.12	0.263	-.0121122	.0033081
Constant	-1.975493	3.655248	-0.54	0.589	-9.139647	5.188661

Table 19. Voting Patterns of Judges on Crack-Cocaine

Outcome	Percent of Judges	Number of Judges
Do not have to follow	27%	7
Must follow	73%	19

As shown in Table 19, there is a strong majority of judges who require adherence to the crack-cocaine ratio. This would suggest that if the economic model was correct, that judges felt requiring district judges to follow the ratio would reduce and simplify their future workloads. Appellate judges would not likely know how many district court judges felt bound by the guideline and how many did not. Accordingly, it would be

difficult for them to determine which outcome would result in more unreasonable sentences that would come back to the appellate court. Since these considerations are likely unclear, the key point seems to be the nature of review appellate judges would have to carryout in each circumstance. Requiring judges to follow the ratio allowed for a relatively easy review on appeal, especially when coupled with a presumption of reasonableness for within guideline sentences. Allowing judges to depart from it, however, would require a more taxing review and would require appellate judges to deal with many potential substitute ratios, varying justifications, and potential sentencing disparities. Taken together, these considerations are consistent with the economic model of judicial behavior. Furthermore, despite not showing a significant statistical relationship, it is instructive to look at the workloads of courts that did not require obedience to the ratio compared to courts that did.

Table 20. Crack-Cocaine Outcomes Ordered by Workload

Circuit	Outcome	Workload
D.C.	Do Not Have to Follow	148
7 th	Must Follow Ratio	346
1 st	Must Follow Ratio	406
8 th	Must Follow Ratio	415
3 rd	Do Not Have to Follow	423
2 nd	Must Follow Ratio	485
11 th	Must Follow Ratio	705
4 th	Must Follow Ratio	706
5 th	Must Follow Ratio	876

We can see in Table 20 that the court with the lowest overall workload, by a fairly large margin, chose not to require district judges to follow the ratio. The other court that did this had a workload that was clumped together in a group that was somewhat lumped in the middle. Meanwhile, the three courts with significantly higher workloads than any other courts, the 4th, 5th, and 11th circuits, required district court judges to follow the ratio.

Obviously, it is difficult to draw strong conclusions from these results, but they do lend some support to principle that judges with higher workloads will be more likely to choose outcomes that reduce their work than judges with lower workloads.

One of the more interesting variables not to show a meaningful relationship on this issue in particular is ideology. The crack-cocaine issue is perhaps the most ideologically charged issue of all of these. The disparity in sentences between crack-cocaine and powder-cocaine offenders has spurred much political debate. This has only been amplified by the racial disparities present in the issue. For example, numerous candidates in the third Democratic presidential primary debate for the 2008 election addressed the disparity between crack-cocaine and powder-cocaine sentences.¹⁰⁷ The effects on defendants are very obvious on this issue, and it is interesting that ideology does not explain the behavior of judges very well. The fact that workload concerns seem to have a stronger basis than ideology is a fairly telling sign that even on an ideologically charged issue, that workload appears to take precedence.

It is also perhaps interesting that district court experience is not statistically significant on this issue. Under advisory guidelines, requiring judges to follow the ratio is a rare formal constraint on the discretion of district court judges. Accordingly, if former district court judges now on the circuit courts share Judge Gertner's view, we would expect them to allow district court judges to depart from the guideline. The sorts of concerns over the utility of the Guidelines expressed by Judge Gertner would be particularly relevant to the crack-cocaine guideline as even the USSC acknowledged its failure to fulfill many of the goals of sentencing. Of course, workload concerns directly

¹⁰⁷ "Transcript of the Third Democratic Primary Presidential Debate," *The New York Times*, June 28, 2007, sec. U.S. / Politics, http://www.nytimes.com/2007/06/28/us/politics/29transcript.html?_r=2&oref=slogin&pagewanted=print&oref=slogin.

affect these judges now, while concerns over district court discretion may only be secondary.

Finally, legalism and pragmatism do not seem to explain much on the crack-cocaine issue. This is possibly because there were legitimate pragmatist and legalist arguments on both sides. Those requiring adherence to the guideline had the legalist separation of powers argument and the pragmatic arguments about disparities and appellate review. Similarly, those who allowed district court judges to deviate from the guideline had the legalist point that all of the guidelines were advisory along with pragmatist concerns over the negative consequences of the guideline. It is possible that legalist and pragmatist arguments alone could not reach a sufficient conclusion, opening the door for judges to minimize their workload.

Conclusions

When we look at the effects of these explanations across all of the issues, we are able to draw some broader conclusions about the role each of them in relation to judicial behavior on the Federal Sentencing Guidelines.

Ideology is certainly the most dominant explanation of judicial behavior. Indeed, it does strongly explain the behavior of conservative judges on the constitutionality of the Guidelines issue. But really, that is about it. It does not serve as the main force acting on liberals for the same issue and it only slightly distinguishes conservatives and liberals on the plain error issue. It did not even show a statistically significant relationship on the other issues. This is significant. Given the broad explanatory power of ideology, it is remarkable to find an area of such consequence where it does not explain much.

But if not ideology, then what? The explanation that seems to hold the best across the issues is the economic theory of judicial behavior. Judges tend to show a general preference for outcomes that reduce their future workloads. Furthermore, judges with higher workloads tend to favor these outcomes more than judges with lower workloads. This is consistent with a conception of judicial utility where judges maximize their leisure time in order to maximize their utility. Additionally, the fact that judges with higher workloads are even more likely to favor outcomes that minimize their workload is consistent with the notion that these judges have more utility to gain from additional leisure time than judges with lower workloads.

Even though workload holds up as the best explanation on these issues, it is undeniable that pragmatist and legalist arguments pervade the opinions in these cases. Yet, on none of the issues did this explain anything statistically. It may be the case that ideological extremism does not properly capture whether a judge is a legalist or a pragmatist for enough judges. It may be the case that pragmatism correlates more with ideology, meaning liberals tend to be pragmatists and conservatives tend to be formalists. There is some evidence that this is the case on the plain error issue. This of course could mean legalism and pragmatism are merely guises for ideological concerns, but they appear to still have some independent power. We see this on the presumption of reasonableness issue, where for legal reasons, judges adopt a more laborious outcome despite no appreciable difference in consequences. Furthermore, the fact that workload explains so much may be vindication of pragmatism. After all, pragmatic concerns and concerns over workload are closely related.

Finally, district court experience only seems to explain the presumption of reasonableness issue. Indeed, its effect on judges on this issue is fairly strong. But the fact that it shows up in no other issue suggests that if it is a factor in decision making, it is a secondary factor. On most issues, appellate judges seem to be more concerned with their current jobs than the jobs they once held.

The implications of these results for criminal defendants and the future of federal sentencing policy are significant. The thrust of future policy in this area will likely be toward simplicity and ease, irrespective of ideological concerns. Some may see this cynically, that judges want to work as little as possible. But there are legitimate benefits to having an efficient criminal justice system. For criminal defendants, casting their legal arguments in these terms is likely the best way to win over judges.